NO. **42489-4-II**

COURT OF APPEALS FOR DIVISION II

STATE OF WASHINGTON

WM DICKSON CO.

Respondent,

v.

MISENAR CONSTRUCTION, INC.

Appellant.

BRIEF OF APPELLANT

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I. INTRODUCTION

Appellant, Misenar Construction, Inc. ("Misenar") hired Respondent, Wm Dickson Company ("Dickson") to develop what would become Lakeridge Estates in Milton, WA. The source of both parties' damages can be traced largely to a single undisputed fact: Dickson's project manager, Michael Hoven, worked off of the wrong set of plans.

The parties contractually agreed that Dickson must present written change orders (whether such changes were initiated by Misenar or by Dickson) representing any changes to the lump sum contract price (or other provisions of the contract) and that Dickson's failure to do so constituted a waiver of Dickson's claims for any additional compensation. Mr. Hoven was responsible for generating and presenting any such change orders. Mr. Hoven did not present written change orders to Misenar and Misenar was unaware that Dickson considered some of the work to be outside of the agreed upon contract price.

Dickson spent much of this litigation presenting confusing documents to convince the trial court that it should be awarded monies over and above the lump sum contract price, while disregarding the most recent project plans and the contractual change order provision. Throughout the litigation Dickson disregarded Superior Court Rules and Washington Case law. Dickson did not meet its burden of proof.

After Dickson rested its case-in-chief, Misenar moved for a Direct Verdict. Dickson neither Answered Misenar's counterclaims nor asserted any affirmative defenses. Despite the lack of notice to Misenar, the trial court denied Misenar's Motion for a Directed Verdict and allowed Dickson to file an Answer. Misenar had to proceed in prosecuting its claims and the trial court ordered Misenar to present its five (5) counterclaims in only two (2) days.

II. ASSIGNMENTS OF ERROR

(1) The trial court erred when it denied summary judgment on the grounds that Misenar had not unequivocally waived its right to written change orders.

(2) The trial court erred when it denied Defendant's Motion for a Direct Verdict when Plaintiff rested its case before it filed any reply to Defendant's counterclaims.

(3) The trial court erred in Findings of Fact ("FF") No. 3 as substantial evidence does not exist to support the finding.

(4) The trial court erred in FF No. 4 as substantial evidence does not exist to support the finding.

(5) The trial court erred in FF No. 5 as substantial evidence does not exist to support the finding.

(6) The trial court erred in FF No. 10 as substantial evidence does not exist to support the finding.

(7) The trial court erred in FF No. 14 as substantial evidence does not exist to support the finding.

(8) The trial court erred in FF No. 16 as substantial evidence does not exist to support the finding.

(9) The trial court erred in FF No. 23 as substantial evidence does not exist to support the finding.

(10) The trial court erred in FF No. 25 as substantial evidence does not exist to support the finding.

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(20) The trial court erred in FF No. 37 as substantial evidence does not exist to support the finding.

(21) The trial court erred in FF No. 38 as substantial evidence does not exist to support the finding.

(22) The trial court erred in Conclusion of Law ("CL") No. 4.

(23) The trial court erred in Conclusion of Law ("CL") No. 7.

(24) The trial court erred in Conclusion of Law ("CL") No. 9.

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(29) The trial court erred in Conclusion of Law ("CL") No. 22.

(30) The trial court erred in Conclusion of Law ("CL") No. 23.

(31) The trial court erred in Conclusion of Law ("CL") No. 24.

(32) The trial court erred in Conclusion of Law ("CL") No. 25.

(33) The trial court erred in Conclusion of Law ("CL") No. 26.

(34) The trial court erred in Conclusion of Law ("CL") No. 29.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. **Did the trial court err in denying Misenar's Motion for Summary Judgment when Dickson failed to prove that Misenar unequivocally waived the contract's written change order requirements when Misenar paid the amount listed on Dickson's Pay Estimate No. 3 with objection?**

B. **Did the trial court abuse its discretion when it found Dickson had not admitted Misenar's counterclaims when Dickson did not Reply to Misenar's counterclaims before it rested its case-in-chief?**

C. **Did the trial court err when it found Misenar waived the written change order requirements when the undisputed findings of fact and substantial evidence show Misenar consistently requested written notice of price changes and estimates/change orders from Dickson?** (FF Nos. 3-5, 26)

D. **Did the trial court err in ordering Misenar to pay Dickson monies for "extras" to the contract when there is not substantial evidence in the record to support the findings?** (FF Nos. 14, 16, 23)

E. **Did the trial court err in dismissing Misenar's affirmative defense of accord and satisfaction when Misenar presented undisputed evidence that it presented supporting documentation for its calculations of what Misenar believed was the amount due and owing and also noted its May 24, 2007 Check as the "*Final payment w/ ret.* (retainage)"?** (FF No. 27)

F. **Did the trial court err when it improperly shifted Dickson's contractual responsibility to protect its work (and pay for any repairs to such work) and to build the by-pass line and the pond wall in the correct location, according to the approved plans?** (FF No. 23, 30, 31, 32, 33, 34, 35, 36, 37, 38)

IV. STATEMENT OF THE CASE

A. The parties entered into a single written agreement on October 14, 2005.

On October 14, 2005 Plaintiff and Defendant entered into a contract wherein Defendant hired Plaintiff to provide site-develop work for a short plat in Milton, Washington, known as Lakeridge Estates.[1] Dickson agreed to use the 10/6/05 approved Site Plans.[2] Dickson agreed that it had examined the Contract Documents and it would be bound by

[1] Trial Exhibit No. 1;CP 21, 23-37. (NOTE: As the Clerk's Papers do not provide separate pagination for the Trial Exhibits, references to the CPs where documents, which were also used as Trial Exhibits, were attached to Court Pleadings are made OR references are made to pages of the Trial Exhibits, specifically, as applicable.)
[2] Trial Exhibit No. 1

the contract's terms and provisions.[3] The parties' agreed to a lump sum contract price.[4] They agreed that if there was to be any change in the contract price that Dickson would prepare and present a change order and notice in writing of any proposed change for Misenar's review (before the work was to be done or a change in the Contract was to be carried out).[5] Per the parties' contract, if Dickson failed to provide timely notice in writing of any such change for Misenar's review before any work was done, such failure was "deemed to prejudice (Misenar)" and Dickson waived any claims against Misenar for compensation for the work.[6] The language the parties' used to memorialize their agreement is as follows[7]:

> **2.4 CHANGES.** (a) The Owner may at any time by written order of Owner's authorized representative, make changes in, additions to and omissions from the Work to be performed under this Contract, and the Contractor, subject to prior written mutually agreed change order, shall promptly proceed with the performance of this Contract as so changed.
>
> (b) For changes in the Contract Documents that have been initiated by the Owner or Owner's Representative and for acts or omissions of the Owner or Owner's Representative and/or defects in the Contract Documents, the Contractor shall submit its proposed change order, including notice thereof for adjustment in the price, schedule or other provisions of the Contract to the Owner in writing in sufficient time and form to allow the Owner to process such claims within the time reasonably required for diligent prosecution of the Work. Failure to provide timely notice shall be deemed to prejudice the Owner and constitute a waiver of such claims by Contractor.

The parties agreed that Dickson would protect its work until final completion and acceptance and that it would repair any damage to its work

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[3] Trial Exhibit No. 1
[4] CP 312, deposition page 59, lines 24-25 through page 60, line 1.
[5] Trial Exhibit No. 1, Section 2.4
[6] *Id.*
[7] *Id.*

at no cost to Misenar.[8] The language the parties' used to memorialize their agreement is as follows:

> 2.16 PROTECTION OF WORK. The Contractor specifically agrees that it is responsible for the protection of its work until final completion and acceptance thereof by the Owner and that the Contractor will make good or replace, at no expenses to the Owner, any damage to its Work, due to lack of appropriate protection measures, which occurs prior to said final acceptance.

The parties agreed, and Dickson's estimator, Randy Asahara's "project work bids" (original and as revised)[9] set forth the "lump sum contract price", and that the Contract required Dickson to use the most recent set of approved "Site Plans" dated October 6, 2005.[10] Dickson represented to Misenar that the project would take Dickson approximately two (2) months.[11]

Misenar agreed to make a final payment along with the 5% retainage within 30 days after Dickson had completed its work and Misenar had accepted the work[12]:

> approval.
>
> 2.5 PAYMENT. (a) The Owner agrees to pay the Contractor for the performance of the Work, the sum of [illegible] dollars ($[illegible].00) adjusted as required by differences between estimated and actual quantities for unit price Work items, if any, and subject to additions and deductions for changes agreed upon or determined, as hereinafter provided.
>
> (b) The Owner shall withhold "Retainage" in the amount of ten (~~10%~~) percent of the total project cost until final plat approval. Upon final plat approval, the Owner agrees to pay the Contractor the remaining ten (~~10%~~) percent of the total project cost (Retainage) for complete performance of the Work under this Agreement. Final acceptance of the Work by the Owner is not a waiver of any claims the Owner may have against the Contractor.

[8] Trial Exhibit No. 1, Section 2.16
[9] See Trial Exhibit #1 (last page) and Exhibit #21)
[10] Trial Exhibit No. 1, Exh. B
[11] Trial Exhibit No. 80.
[12] Trial Exhibit No. 1, Section 2.5

The parties made some initial changes to the contract price (based on the design of the Pond Wall, reflected in the 10/20/05 plans) and Dickson submitted, in writing, a revised bid dated October 27, 2005.[13] Within a week of the parties agreeing on the revised bid, Pierce County changed the type of pipe for the project from HDPE pipe to Ductile Iron Pipe ("DIP").[14] Mr. Asahara provided Mr. Misenar with written notice of such in the form of a written estimate of the change in price.[15] Misenar was unaware of any other changes to the lump sum contract price as Dickson did not present any written change orders pursuant to the parties' contract.[16]

The contract, which integrated the 10/6/05 approved Site Plans upon which Dickson based its bid, set forth specific lot and road grading levels for the plat.[17] Dickson agreed, per the Scope of Work, to "cut and fill to subgrade" (also known as "balancing the site").[18] Based on the grades as set forth in the agreed upon Site Plans revision date of 10-6-05[19] and Dickson's own investigation[20], in order to carry out this part of the work, Dickson would have been required to import seven thousand four

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[13] Trial Exhibit No. 21.
[14] CP 143
[15] Trial Testimony, page 29, lines 19-25 through page 30, lines 1-9. See Trial Exhibits No. 12 & 13.
[16] CP 21-22, ¶s 4 & 5.
[17] Trial Exhibit Nos. 1, 21 & 115.
[18] Trial Exhibit No. 1, page 2., ¶2.3 "Site Work: "... cut and fill site to subgrade, ..."
[19] Trial Exhibit #115.
[20] See Trial Exhibit #113.

hundred fifty-eight (7,458) cubic yards of material (at 1.98 tons/cubic yard[21]=14,767 tons[22] in order to "balance the site."[23]

After signing the contract, Dickson secured an agreement from Misenar to change the grading levels, which, based on Dickson's investigation[24], resulted in a one hundred seventeen (117) cubic yard (232 tons) surplus in material.[25]

The project ended up taking closer to six (6) months rather than the two (2) months Dickson had represented[26] and the project manager, Michael Hoven had "scheduled".[27]

While Misenar did not immediately improve Lot #2 while short platting the property, it had drawn a set of house plans (for Mr. Misenar's in-laws) engineered and designed based on the development plans.[28] When Misenar began developing Lot #2, the City of Milton officials told Misenar that they could not build the house that had been specifically

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[21] Trial Transcript, page 226, lines 7-10

[22] The value of this material, that Dickson did NOT have to import, based on Holroyd's prices (a company Mr. Asahara testified that Dickson acquired materials from at times) (Trial Exhibit No. 106). Trial Transcript, page 207, lines 9-12.

[23] Trial Exhibit No. 113. Dickson presented evidence at trial that "balancing the site" was necessary to avoid additional costs for export or import of materials. Trial Transcript, page 250, lines 24-25 through page 252, lines 1-9

[24] Trial Exhibit #114.

[25] Trial Transcript, page 234, lines 10-22. See also Mr. Asahara's testimony on re-direct where he confirmed that the changes to the grades occurred AFTER the Contract had been signed (and hence Dickson was contractually obligated to "*balance the site*") at Trial Testimony, page 251, lines. 23-25 through page 252, lines 1-7, lines 19-22

[26] Trial Transcript, page 953, lines 6-25 through page 954, lines 1-7.

[27] Trial Exhibit #80.

[28] Trial Transcript, pager 980, lines 9-12

designed and engineered for Lot #2 since the house's foundation would be located over, or too near to, the current location of the By-Pass Line, which violated the City's construction codes.[29]

Dickson failed to properly install the By-Pass Line in the correct location within the development. If Dickson had installed the By-Pass Line in the proper location, there would not have been a problem to build the house on Lot #2. Dickson built the West wall of the Pond Retaining Wall outside of the boundary limits of Tract C. The West wall encroached onto and within the 12' access easement on Lot #2, thereby causing further problems for Misenar's intended use of the Lot as well as causing a serious breach of Misenar's "Ingress and Egress Easement" agreement with the property owners to the north of the Plat.[30]

Dickson did not complete the clearing and grubbing (along the boundary) pursuant to the parties' contract.[31] Dickson removed, buried, and/or misplaced survey stakes.[32] Misenar incurred two hundred sixty-one dollars ($261) in costs clearing the fence line and four hundred eight dollars ($408) in re-staking the curb entries.[33]

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[29] Trial Exhibit No. 92
[30] Trial Exhibit Nos. 27A, 153, & 154. See also the "post-trial Exhibit" at CP 895.
[31] Trial Exhibit Nos. 61 & 62
[32] *Id.*
[33] *Id.*

Thirty (30) days after Dickson completed the project, on May 24, 2007, Misenar provided Dickson with a final payment.[34] Misenar subtracted costs it incurred for clearing and grubbing, etc. and labeled the check as a final payment with Retainage and sent it to Dickson.[35] Dickson negotiated the check.[36] Misenar did not hear from Dickson again until June 2008 when Dickson suddenly alleged the extra work that is the subject of Dickson's claims.[37]

B. Misenar moved for Summary Judgment based on a lack of change orders.

Misenar moved for summary judgment on the grounds that the parties' contract required that any changes to the lump sum contract price were to be in writing prepared by the Contractor, Dickson.[38] Misenar relied heavily upon *Mike M. Johnson, Inc. v. County of Spokane*, 150 Wash.2d 375, 78 P.3d 161 (2003) and presented evidence that it did not receive any change orders for work outside the lump sum contract and that it believed all of Dickson's work to be within the scope of the parties' contract.[39]

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[34] Trial Exhibit No. 61
[35] *Id.* See also Trial Transcript, page 988, lines 13-17.
[36] Trial Exhibit No. 61
[37] Trial Transcript, 987, lines 6-11
[38] CP 15-20.
[39] CP 21-22.

Misenar provided undisputed evidence that it had only one price dispute with Dickson during the project when it received Pay Estimate No. 3.[40] When Dickson submitted the Pay Estimate #3 to Misenar, Misenar informed Dickson that its "notice" of extra charges was unacceptable.[41] Misenar demanded that Dickson submit a written break down and backup documentation.[42] While Misenar did make a good faith payment in the amount listed in Pay Estimate No. 3, Misenar withheld payment for unexplained charges for the rest of the project.[43] Dickson noted Misenar's objection to the unexplained charges and credited what appeared to Misenar to be the extra charges to Misenar's account as "January overbilling" on the rest of its invoices.[44]

Misenar presented undisputed evidence that while he did pay the entire amount listed in Pay Estimate No. 3, it did so only after it contact Dickson, disputed that any of the work was "extra."[45] Misenar paid Pay Estimate No. 3 in January 2006[46] and Dickson credited Misenar's account with the overbilling in subsequent invoices.[47]

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[40] CP 251-255.
[41] CP 95, lines 1-7.
[42] *Id.*
[43] CP 252, ¶4.
[44] CP 253, ¶6, CP 259-269.
[45] CP 251-252.
[46] CP 211, paragraph 5.
[47] CP 259-269

Dickson did not dispute that it failed to present written change orders to Misenar and agreed that *Mike M. Johnson, Inc.* applied.[48] Dickson conceded that in order for its claim to survive summary judgment, Misenar's conduct must amount to an unequivocal waiver of the written change orders.[49] Dickson argued that in paying the amount listed in Pay Estimate No. 3, Misenar waived its contractual right to change orders.[50]

The trial court found the facts of the present case to be "significantly different" from the facts of *Mike M. Johnson, Inc.* and therefore, *Mike M. Johnson* did not govern the dispute.[51] The trial court found there to be "factual issues as to whether the parties agreed to deviate from the contract language."[52]

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[48] CP 71, 73. Project Manager Michael Hoven's Declaration in Opposition to Summary Judgment is misleading. Mr. Hoven provided thirty-three (33) exhibits, many of which are "unit price breakdowns". However, in Misenar's Motion for Summary Judgment, Mr. Hoven did not assert the exhibits to his declaration were change orders presented to Misenar for a change in the lump sum contract price. For example, on CP 117, lines 26-28 Mr. Hoven testified:

> we performed the work as he directed. No contract change order was prepared for the change in the unit price. A copy of a revised unit price breakdown showing the change is attached to this declaration as Exhibit 2.

In some cases, Mr. Hoven stated that he did provide Misenar with a cost breakdown, but did not state when he purportedly did so. CP 118, paragraph 5. Misenar acknowledges receiving the cost breakdowns over a year after the project was finished when Dickson first approached Misenar about the purported "extras." CP 111. Mr. Hoven further testified that the exhibits to his declaration were not true and correct copies of the presented to Misenar, but reconstructions of the same. CP 121, paragraph 25.

[49] CP 73, line 10

[50] CP 73, lines 14-16

[51] CP 356-57

[52] CP 357.

C. The parties went to trial.

1. Dickson did not Answer Misenar's counterclaims before it rested its case-in-chief.

Misenar brought its first counterclaims on May 27, 2009.[53] It alleged breach of contract for Dickson's failure to secure written change orders, for installing defective sidewalks, and for back charges and costs.[54]

On March 15, 2010, with the trial court's permission, Misenar brought another counterclaim.[55] It alleged Dickson breached the parties' contract by improperly installing the storm water by-pass line.[56]

On May 17, 2010, with the trial court's permission, Misenar brought a fifth counterclaim.[57] It alleged Dickson breached the parties' contract by improperly installing the retention pond and walls.[58]

The parties went to trial on September 21, 2010. Dickson rested its case-in-chief on September 27, 2010.[59] When Dickson questioned its witnesses about Misenar's counterclaims, Misenar objected.[60] The trial court allowed the testimony for the purposes of judicial economy and did not allow the testimony pertaining to Misenar's counterclaims to be part of

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[53] CP 49-52
[54] *Id.*
[55] CP 412-13
[56] *Id.*
[57] CP 506-07
[58] *Id.*
[59] Trial Transcript, page 552, lines 8-9.
[60] Trial Transcript, page 88, lines 4-13.

Dickson's case-in-chief.[61] Dickson had not filed an Answer to any of Misenar's counterclaims when it rested.

After Dickson rested, on September 27, 2010, Misenar filed a Motion for Direct Verdict pursuant to CR 7(a) & CR 8(d).[62] Dickson neither moved to reopen its case nor for leave to file a reply to Misenar's counterclaims. It then, without leave from the trial court, filed Plaintiff's Reply to Defendant's Counterclaims.[63] Misenar objected.[64]

The trial court confirmed that Dickson rested.[65] It confirmed that Dickson did not file an Answer to any counterclaims as required under CR 7(a) and 12(c)(4).[66] The trial court held that it had discretion pursuant to *Beers v. Ross*, 137 Wash.App. 566, 154 P.3d 277 (Div. 2, 2007) to allow Dickson to file a Reply after it had rested.[67]

2. The record does not contain evidence of waiver of written change orders.

The trial court revisited the written change order issue at trial.[68] The trial court properly found that when the parties agreed to change the retaining wall design, Dickson notified Misenar that such change in wall design would require a change in the contract price and then reduced the

[61] Trial Transcript, page 577, lines 11-13
[62] Trial Transcript, page 552, lines 13-15, CP 648-654.
[63] CP 659-662
[64] CP 678, lines 18-20, CP 684-687
[65] CP 559, lines 7-9.
[66] Trial Transcript, page 592, 16-19.
[67] Trial Transcript, page 577, lines 19-21, page 592, lines 21-23.
[68] CP 969

change to writing in an updated Project Work Bid dated October 27, 2005.[69] The trial court properly found that when the parties agreed to change the contract to replace HDPE pipe to DIP pipe, Dickson put Misenar on notice of such change in price and drafted and provided Misenar with a written estimate.[70]

The trial court properly found that when Pierce County required a different kind of backfill than the parties contractually agreed to, that Misenar specifically requested that Dickson provide a written change order, BEFORE any "import trench backfill" was provided.[71] The trial court properly found that Dickson did not timely provide Misenar a written estimate and that when Dickson included and EXTRA for the "import trench backfill" on a billing, Misenar immediately objected.[72]

The record contains no evidence to support the Court's finding that the parties agreed that Dickson's representatives would discuss proposed changes and expected costs with Misenar, who would either approve or reject the change, without a written estimate/change order.[73] The record

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[69] Trial Transcript, page 12, lines 10-15; page 40, lines 4-25 through page 42, lines 1-3, lines 9-13, page 266, lines 8-24; Trial Exhibit No. 21.
[70] Trial Transcript, page 14, lines 3-21, page 29, lines 24-25 through page 30, lines 1-9, page 31, lines 2-5, 20-23, page 32, lines 17-22, page 41, lines 10-25 through page 42, lines 1-8, page 266, lines 8-24, Trial Exhibits 12 & 13.
[71] *Id.*
[72] CP 970-71.
[73] The trial court's finding can be found on CP 969. The record does not contain evidence to support the trial court's FF No. 26 that Misenar did not prove a failure to

contains no evidence that Misenar did not want to delay the project for the time it would take to draw up written change orders.[74] The record does not contain evidence that Misenar unequivocally waived the requirement for written change orders.[75]

3. The record does not contain evidence that handling imported materials required more labor and equipment than the handling of native fill.

While hoping to save money using native fill[76], the parties were both aware that Pierce County likely would require imported trench backfill.[77] Dickson would have to do the same work regarding the trench backfill, whether it was using native materials or imported materials.[78] The parties decided to leave the trench backfill out of the contract, giving

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comply with a contractual condition consistent with the findings…that the parties mutually waived the contract provision regarding written change orders.

[74] *Id.*

[75] *Id.*

[76] CP 289, deposition page 37, lines 13-20.

[77] Trial Transcript, page 204, lines 6-10. Dickson first bid the project based off of the 10/6/05 plans at $411,531.05. Trial Exhibit No. 1; See also Trial Transcript, page 200, lines 15-19. When the parties agreed to change the retaining wall design, the parties agreed to a contract price of $421,251.05. Trial Exhibit No. 3; See also Trial Transcript page 200, lines 15-25 through page 201, lines 1-3. While the trial court found the parties based their contract price upon their "understanding that they would attempt to get Pierce County to approve the use of native soil for backfill," there is no evidence in the record that the parties' contract price is based upon anything but the 10/06/05 plans and the parties agreement to change the retaining wall.

[78] Trial Transcript, page 206, lines 17-20. In his testimony, Randy Asahara implies that having to use import fill MAY require Dickson, in some circumstances to either haul it to the back of the lots or spread it and compact it. Trial Testimony, page 256, lines 4-6. However, Mr. Asahara had no knowledge as to what, if anything Dickson had to do with the native material. *Id.* at page 7-8.

Misenar the option of being able to hire another contractor/supplier to supply the trench backfill, if needed.[79]

As set forth in the trial court's unchallenged findings, Pierce County required import trench backfill to be used.[80] Misenar requested a bid for Dickson to import backfill, but Dickson did not provide one in a timely manner.[81] Dickson ultimately, and without Misenar's knowledge or permission, hired a third party to import material for the trench backfill.[82]

As the trial court properly found, when Dickson billed Misenar for the imported backfill, Misenar immediately objected.[83] The trial court also found that Misenar obtained a bid from Holroyd to deliver and place the same "import trench backfill" (screened pit run) for $14,888.25.[84]

The trial court erroneously found that "[t]he use of import trench backfill did result in increased costs to Dickson at least in part because there was more labor and equipment necessary to use the important materials instead of the native soils."[85] There is no evidence anywhere in

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[79] Trial Transcript, page 204, lines 16-19, page 205, lines 6-10.
[80] Trial Transcript, page 204, lines 6-12
[81] CP 970-971, FF No, 11. Dickson understood that Misenar expected to be given the option, as with all potential changes, to the contract, to be able to determine whether or not it wanted Dickson to supply the additional material (perform the additional work, as the case may be) or to retain the services of another contractor/supplier or even do the work itself. Trial Transcript, page 205, lines 6-10.
[82] Trial Transcript, page 285, lines 4-6.
[83] CP 971, FF No. 13.
[84] Trial Exhibit 106. Finding of Fact #14, CP 971 lines 11-13.
[85] CP 971, FF No. 14

the record that the use of import trench backfill required more labor and equipment costs than the use of native fill.

4. There is not substantial evidence in the record to support the trial court's finding that the tree removal was not part of the parties' contract.

a. Misenar owned the property with the tree that Dickson removed.

The parties agree that Misenar owned the entire property it hired Dickson to develop, including the property containing a tree that ultimately needed to be removed.[86] Despite the parties agreeing on this fact, the trial court found that the "[w]ork on the project necessitated removal of a tree located on property that did not belong to Misenar (the existing home on 23rd Avenue).[87] The trial court found that "[b]ecause the tree was not on the property that was to be cleared and grubbed, it could not have been contemplated that the tree would have to be removed under the contract."[88]

b. The contract charged Dickson with removing the tree.

The record shows that the parties agreed that pursuant to the terms of the contract, Dickson was responsible for clearing and grubbing the

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[86] CP 887-88, paragraph 49, CP 912, lines 5-7, & CP 916-20. While Dickson ultimately concedes that Misenar owned the property upon which the tree was located, a fact, supported by property records, its employees apparently mistakenly believed Misenar did not own the property, and testified to that fact. Trial Transcript, page 249, lines 15-16; page 140, lines 18-20. All of the Civil Site Plans (Exhibits #115, 116 & 120) showed that "Lot 14" of the 14-Lot Plat was a part of the entire development owned by Misenar.

[87] CP 972, FF No. 16.

[88] *Id.*

construction site.[89] The record shows that Dickson's project manager agreed that according to the 10/6/05 plans, the tree had to be removed.[90]

5. The contract charged Dickson with requesting staking for and properly locating the pond wall.

There is no dispute that Dickson built the pond wall in the wrong location.[91] There is no dispute that it was Dickson's responsibility to call for staking for the pond wall and that Dickson made the staking requests for this project.[92]

There was no evidence, and the trial court did not find, that Dickson called for the surveyor to stake the location of western wall of the Pond Wall. The only evidence in the record of staking requests in the vicinity of the Pond Wall and the bypass line, were limited to the Catch Basins, a "rockery" wall (located in the northerly part of the Pond). [93] There is NO

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[89] Trial Transcript, page 217, lines 4-11; page 136, lines 8-15; page 217, lines 4-11.
[90] Mr. Hoven testified that he worked off of the 9/12/05 plans and believed the 10/6/05 plans to be a change. Trial Transcript, page 411, lines 19-24. Mr. Hammond's testimony is consistent with Dickson working off the "wrong" set of plans. Trial Transcript, page 127, lines 19-25 through page 128, lines 1-24. Mr. Hoven believed the 10/6/05 plans indicated the tree had to be removed. Trial Transcript, page 412, lines 4-5. Mr. Hammond testified that the tree would need to be removed to built the sidewalk according to the 10/6/05 plans. Trial Transcript, page 137, lines 18-22. As stated in Trial Exhibit No. 28, Misenar believed the tree removal to be part of the 10/6/05 plans.
[91] Trial Exhibit Nos. 27A, 153, & 154.
[92] Trial Transcript, page 94, lines 25-25 through page 95, lines 1-12, page 100, lines 20-25, page 273, lines 22-25 through page 274, lines 1-4, page 369, lines 15-18, page 373, lines 6-7.
[93] Eric Isaacson testified that Dickson, through Mr. Hoven, only requested staking on 10-20-05, based on the 10/6/05 plans-not the 10/20/05 plans which contained the redesigned wall and new bypass line location- for the Catch Basins (#1, #2, #3), 'Outfall' and "Bypass" (the piping coming into the south wall of the pond off of Nevada Ct. – not the miss-located bypass line located on Lot #2). ***Trial Exhibit #143 & #144***. See also **TT. p.**

evidence of requests by Dickson for the staking of the West wall of the pond or of the bypass line (based on the revised pond wall design and new bypass line location in the 10-20-05 Plans – Trial Exhibit #116).

V. ARGUMENT

A. The Trial Court erred when it denied Misenar's Motion for Summary Judgment.

Orders for summary judgment are reviewed de novo. *See e.g., City of Seattle v. Mighty Movers, Inc.*, 152 Wash.2d 343, 348, 96 P.3d 979 (Wash., 2004). Under CR 56(c), a court may grant summary judgment if the record presents no genuine issue of material fact and the law entitles the moving party to judgment. *Id.* The court should grant summary judgment when reasonable persons could reach but one conclusion. *See e.g., Retired Pub. Employees Council of Wash. v. Charles*, 148 Wash.2d 602, 613, 62 P3d 470 (2003).

Misenar and Dickson agreed that the language of the parties' contract required all change orders to be in writing.[94] The issue before the

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742 ll. 16-20, p. 743 ll. 7-10, p. 745 ll. 5-15, p. 747 ll. 3-6, See also **TT p. 751 ll. 21-23**. Mr. Isaacson testified that later (on 10-26-05), Dickson requested the surveyors to stake the "Rockery" (the rock wall at the northern section of the pond). ***Trial Exhibit #117.*** See also **TT p. 740 ll. 6-13 & ll. 20-23; TT. p. 971 ll. 14-23**.; see also ***Trial Exhibit #143.*** **NOTE:** the evidence of later 'staking requests' was for the sewer structures (see ***Trial Exhibit #146***).

[94] Dickson argues that the parties' contract is ambiguous asking the rhetorical question of "[h]ow much time did Misenar need for diligent prosecution of Work?" See CP 72, lines 22-23. Dickson concedes in the very next line of its brief that its ambiguity argument is moot since change orders were not produced. *Id.* at lines 23-25. In its Issue Statement, Dickson asks the Court to determine if Misenar waived strict compliance with the

trial court was if Misenar waived compliance with the procedural requirements of the contract when it paid the amount listed on Pay Estimate No. 3.[95] The trial court essentially found that Misenar did not unequivocally waive its right to written contract and that factual issues remained as to if Misenar agreed to deviate from the contract's procedural requirements.[96]

1. When the trial court found factual issues as to whether the parties agreed to deviate from the contract language, it erred in denying Misenar's Motion for summary judgment.

The Washington Supreme Court explained in *American Safety Cas. Ins. Co. v. City of Olympia*, 162 Wash.2d 762, 771, 174, P.3d 54 (2007). that ambiguities that would normally preclude the Court from granting summary judgment have the opposite affect when the Court is evaluating whether or not conduct is unequivocal: "While in some cases equivocal conduct does create an issue of material fact, in which case it would be improper to grant summary judgment, such ambiguity here means that the conduct, by definition was not unequivocal, as required by the waiver."

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procedural requirements of the contract and does not raise the ambiguity argument as an issue. CP 71.

[95] CP 71 & CP 73, lines 14-16.

[96] CP 357

Waiver by conduct requires unequivocal acts of conduct evidencing an intent to waive. *Id.* at 773. Equivocal conduct by definition cannot be unequivocal. *Id.* at 771.

The trial court found there to be an issue of material fact as to whether Misenar's conduct was an unequivocal waiver, or an ambiguity as to the meaning of Misenar's conduct. The Washington Supreme Court holds that such an ambiguity required the trial court to grant Misenar's Motion for Summary Judgment. Given the questions that surrounded whether or not Misenar waived written change orders, its conduct, by definition, cannot be unequivocal.

2. The trial court erred when it distinguished *Mike M Johnson, Inc. v. County of Spokane*, 150 Wash.2d 375, 78 P.3d 161 (2003) from the present case.

Despite both parties agreeing that the Washington Supreme Court's decision *Mike M. Johnson* governed their dispute, the trial court found the facts to be "significantly different." The trial court did not elaborate on its findings or explain why it disregarded controlling authority with no distinguishable facts.

Mike M. Johnson, Inc. is a case wherein the Washington Supreme Court upheld the well established principle that procedural contract

requirements must be enforced absent either a waiver by the benefiting party or an agreement between parties to modify the contract.[97]

The parties in *Mike M. Johnson*, had contracts with provisions similar to the provisions in Misenar and Dickson's contract. *Id.* at 378. Like Misenar, the project owner ("the county") could change the contractor's ("MMJ") work within the general scope of the contract at any time through a written change order subject to certain procedural requirements governing any claims MMJ may have for additional compensation. *Id.* at 378-79. Like Misenar and Dickson's contract, the contracts in *Mike M. Johnson, Inc.* stated that if the contractor failed to follow the contract's procedural requirements, then the contractor completely waived any claims it had for protested work. *Id.*

Just after MMJ began work on the project, the county submitted a revised design to MMJ and issued a proposed change order. *Id.* The change order included a proposal to increase MMJ's compensation by

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[97] *Mike M. Johnson, Inc.* 150 Wash.2d at 377-78; *See also Bjerkeseth v. Lysnes* 173 Wash. 229, 232, 22 P.2d 660 (1933) (affirming the dismissal of contractor's claim for extra work where there was no written order as required by the contract and no waiver of the requirement for such writings & that labor and materials were not extras unless they were treated as such at the time they were furnished); *See also Absher Constr. Co. v. Kent School Dist. No. 415*, 77 Wash.App. 137, 142, 890 P.2d 1071 (1995) (relied upon in *Mike M. Johnson, Inc.*, 150 Wash.2d at 386 for its holding that in order for a party's conduct to constitute a waiver of a contractual provisions, the conduct must be unequivocal and evidence an intent to waive.); *Swenson v. Lowe*, 5 Wash.App. 186, 188, 486 P.2d 1120 (1971) (holding that a building contract provision requiring a written order for alterations or extras will be enforced).

$69,319.00 and add eight working days to the project. *Id.* MMJ made no objection or protest to the design change, proposed compensation, or altered schedule and began the work under the change order. *Id.* Misenar and Dickson made a similar change in their contract almost immediately after entering it, increasing the bid price (for the re-designed pond wall).

MMJ submitted a letter to the county which included claims of increased delays and costs due to miss-located/unknown utilities. *Id.* at 381. The county notified MMJ that it believed that utility conflicts were already anticipated/included in the contract. *Id.* It told MMJ that to the extent MMJ may consider its letter any sort of formal notification of a claim pursuant to the contract, the letter was rejected because it was too general and nonspecific. *Id.* at 382.[98]

Dickson submitted its proposed changes to Misenar in the form of a Pay Estimate. Like the county in *Mike M. Johnson*, Misenar immediately objected, stating that the "notice" in the form of Pay Estimate No. 3 was insufficient and asked for a written change order with a break down of the increased costs.

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[98] MMJ submitted a request to the county for payment in the amount of $98.000.00 and included a spreadsheet with items occurring three and a half (3.5) months earlier without supporting explanations and without any references to the contract and did not state whether responsibility laid with MMJ or the county. *Id.* Similarly, Plaintiff submitted Pay Estimate #5 - years later (one version in June 2008 and another version in December 2008), which was a spreadsheet without any explanations. The Washington Supreme Court in the *Mike M. Johnson, Inc.* case rejected such a demand and spreadsheet as unacceptable notice.

MMJ argued that actual notice of changes to a contract were an exception to the contracts' procedural requirements or, in the alternative, that the county had waived MMJ's compliance with the contractual procedural requirements when it engaged in settlement discussions. *Id.* at 391. Dickson concedes that actual notice is not an exception to the contract's procedural requirements, but argues Misenar waived compliance with the contract provision when it paid Pay Estimate No. 3.

The Washington Supreme Court found in *Mike M. Johnson, Inc.* that there was no evidence of unequivocal waiver of any rights under the contract. The record in the present case is similarly devoid of any evidence of unequivocal waiver of Misenar's contractual rights. The only act Dickson contended in opposing Misenar's Motion for Summary Judgment that constituted a waiver of Misenar's rights under the contract was Misenar's payment to Dickson in the amount listed on Pay Estimate No. 3. The undisputed evidence at summary judgment showed that Misenar made the payment only after objecting and demanding a written change order/break down and then, when it did not receive the change order as promised, withheld the amount of money Dickson charged for the purported claims in future payments. As in the record in *Mike M Johnson, Inc.* the record unequivocally indicates that Misenar did not intend to waive its right of written changes orders.

The facts in *Mike M Johnson, Inc.* and the present case are extremely similar. There are no material differences in the fact patterns. The trial court erred when it failed to apply the Washington Supreme Court's holdings in *Mike M Johnson, Inc.* to Misenar and Dickson's dispute and failed to grant Misenar's Motion for Summary Judgment.

B. The trial court erred when it denied Misenar's Motion for a Directed Verdict at the end of the Plaintiff's case-in-chief.

CR 7(a) reads in its entirety:

> (a) Pleadings. **There shall be** a complaint and an answer; **a reply to a counterclaim denominated as such**; an answer to a cross claim, if the answer contains a cross claim; a third party complaint, if a person who was not an original party is summoned under the provisions of rule 14; and a third party answer, if a third party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third party answer. (**Emphasis** added).

CR 8(d) reads in its entirety:

> (d) Effect of Failure To Deny. **Averments in a pleading to which a responsive pleading is required**, other than those as to the amount of damage, **are admitted when not denied in the responsive pleading.** Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided. (**Emphasis** added).

CR 12(a)(4) reads in its entirety:

> (4) Within the period fixed by any other applicable statutes or rules. A party served with a pleading stating a cross claim against him shall serve an answer thereto within 20 days

> after the service upon him. **The plaintiff shall serve his reply to a counterclaim in the answer within 20 days after service of the answer** or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court. (**Emphasis** added).

As the trial court held, the Civil Rule and applicable case law required Dickson to file a counterclaim. *Beers*, 137 Wash.App. at 573. In *Beers*, Division 2 held that "[t]he Superior Court Rules require a reply to a counterclaim; it is not optional.[99] The *Beers* court also held that **failure to deny an averment in a counterclaim constitutes an admission.** *Id.*[100]

The Court of Appeals, Division 2 recently held that "[t]he Superior Court Rules require a reply to a counterclaim; it is not optional. *Beers*, 137 Wash.App. at 573 (citing *Jansen v. Nu-West, Inc.*, 102 Wash.App. 432, 438, 6 P.3d 98 (2000)) (citing CR 7(a)) review denied, 143 Wash.2d 1006, 20 P.3d 945 (2001). **Failure to deny an averment in a counterclaim constitutes an admission.** *Id.* (citing *Jansen*, 102 Wash.App. @ 438 (citing CR 8(d)). (**Emphasis** provided).

In *Beers*, Division 2 cited with approval Division 3's *Jansen* decision. In *Jansen*, a commercial lender initiated a non-judicial foreclosure

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[99] (citing *Jansen v. Nu-West, Inc.*, 102 Wash.App. 432, 438, 6 P.3d 98 (2000) (citing CR 7(a)) review denied, 143 Wash.2d 1006, 20 P.3d 945 (2001).

[100] (citing *Jansen*, 102 Wash.App. @ 438 (citing CR 8(d)). (**Emphasis** provided).

on a Deed of Trust in early 1996.[101] Jansen brought a Complaint seeking to quash the trustee's sale and for a declaration of the amount owed.[102] After the lender conceded the Deed of Trust was defective, the trial court entered an order quashing the trustee sale.[103]

On June 10, 1996, the lender brought a counterclaim to judicially foreclose on the Deed of Trust as a mortgage.[104] Jansen did not reply.[105] In September 1996, the lender moved for summary judgment on the counterclaim.[106] The parties continued the Motion for Summary Judgment several times to conduct further discovery.[107]

In July 1997, the lender renewed its Motion for Summary Judgment.[108] The trial court granted the Motion in August 1997.[109] In July 1998, Jansen finally answered the counterclaim and raised an affirmative defense for the first time.[110] The parties conducted a jury trial and the jury found in Jansen's favor.[111]

The Court of Appeals reversed the trial court, finding that, since Jansen failed to answer the lender's counterclaim within twenty (20) days, he

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[101] 102 Wash.App. at 435.
[102] *Id.* at 436.
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.* at 436-437.
[109] *Id.* at 437.
[110] *Id.*
[111] *Id.*

admitted the counterclaim at the time the lender brought its motion for summary judgment.[112]

While the underlying lawsuits are different in *Jansen* and in the present case, *Jansen* is analogous to the present case. Dickson never replied to Misenar's counterclaims before it rested its case-in-chief at trial. The *Jansen* court treated Jansen's reply after two (2) years (and before Jansen rested his case-in-chief) as though he did not reply to the counterclaim.

When the lender in *Jansen* brought a motion for summary judgment, the Court of Appeals held that the counterclaim was admitted. Dickson rested its case before replying to Misenar's counterclaims. Dickson admitted Misenar's counterclaims.

It is very clear that replying to a counterclaim is not optional. Dickson was required to reply to Misenar's counterclaims. It is also very clear that Dickson's failure to reply to Misenar's counterclaim before resting its case-in-chief constituted an admission of such counterclaims.

When it did not deny the counterclaims, pursuant to the governing Washington case law, Dickson admitted that it breached the parties' contract when it did not submit written change orders, installed defective sidewalks, for back charges and costs, improperly installed the storm water by-pass line, and improperly installed the retention pond and walls.

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[112] *Id.* at 438.

While the trial court is correct that the *Beers* decision governs Misenar's Motion for a Directed Verdict, it erred in holding that *Beers* gave it discretion to allow Dickson to file a Reply to Misenar's counterclaims after it Dickson rested its case-in-chief.

In *Beers*, the plaintiff did not timely reply to the defendant's counterclaims. *Id.* at 569. The defendant subsequently moved for summary judgment and dismissal of the Beers' claims and for judgment on the pleadings of her counterclaims. *Id.*

The plaintiff moved for leave to file a late reply and the trial court denied the plaintiffs' request for leave to file a late reply to the defendant's counterclaims. *Id.*[113]

The issue before the *Beers* court was whether the trial court had the discretion to grant a Motion for Leave to File a Late Reply. *Id.* at 573. The *Beers* court held that a motion to file an untimely reply is addressed to the sound exercise of the trial court's discretion. *Id.*[114] Division 2 ultimately held that the trial court erred when it denied the Beers' motion for no apparent reason. *Id.* at 574.

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[113] After filing a Motion for Leave to File a Late Reply, the plaintiff filed a Reply to the Counterclaim. The Court of Appeals, Division 2, acknowledged that the improper Reply had been filed but proceeded under the assumption that the plaintiff had failed to timely Answer the Reply. *Beers*, 137 Wash.App. at 573.

[114] CR 6(b); *Goucher v. J.R. Simplot Co.*, 104 Wash.2d 662, 665, 709 P.2d 774 (1985).

The *Beers* decision did not give the trial court discretion to deny Misenar's Motion for a Directed Verdict. The discretion the *Beers* court afforded the trial court was the discretion to grant a Motion for Leave to File a Late Reply. Such a motion was not before the trial court. Dickson could not make a motion - it had rested and had not moved to reopen its case. When Dickson failed to file its Reply to Misenar's counterclaims before resting, it admitted Misenar's counterclaims pursuant to CR 8(c). As such, the trial court erred in denying Misenar's Motion for Directed Verdict on its counterclaims.

C. The trial court's findings of fact must be supported with substantial evidence in the record and it must apply to correct legal standard to the facts under consideration.

Pursuant to well established Washington case law, the trial court's findings of fact can be upheld on appeal only if substantial evidence exists in the record for each finding.[115] Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding.[116]

In reviewing Conclusions of Law, this Court must determine if the trial court applied the correct legal standard to the facts under

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[115] *See e.g., Puget Sound Reg'l Transit Auth.*, 156 Wash.2d 403, 419, 128 P.3d 588 (2006).
[116] *See e.g., World Wide Video, Inc. v. City of Tukwila*, 117 Wash.2d, 382, 387, 816 P.2d 18 (1991).

consideration.[117] This Court's review of the trial court's Conclusions of Law is de novo.[118] Every Conclusion of Law, however, necessarily incorporates the factual determinations made by the court in arriving at the legal conclusion (or ultimate fact).[119]

1. The record does not contain substantial evidence that the parties agreed to waive the contract's written change order requirement.

There is not substantial evidence in the record that supports the trial court's FF Nos. 3, 4 & 26, wherein the trial court found that, in lieu of Dickson drawing up written change orders, Dickson's representatives would discuss proposed changes and expected cost with Misenar, which would either approve or reject the change. While the trial court found "numerous emails" support the pattern of informal changes to the contract, none of the emails in this Court's record support the finding that the parties agreed *"that Dickson's representatives would discuss proposed changes and expected cost with Misenar, who would either approve or reject the change"*[120] without a written notice of a price change or change order. To the contrary, the evidence in the form of the emails confirms that Misenar expected written notice of any changes (and changes in price) and that Dickson did provide such written notice for the two changes to

[117] *See e.g., Rasmussen v. Bendotti*, 107 Wash.App. 947, 954, 29 P.3d 56 (Div. 3, 2001).
[118] *Id.* (citations omitted)
[119] *Id.* (citations omitted).
[120] Finding of Fact No. 4, CP 969 ll. 15-17.

the contract price provided BEFORE the work was done (the re-designed pond wall and the DIP pipe change) which Misenar acknowledged and agreed to pay.[121]

There is no evidence in the record to support the Court's finding that Misenar did not want to delay the project for the time it would take to draw up written change orders.

The trial court found five (5) of the "extras" Dickson asserted to be outside the scope of the contract. The record shows that none of the purported "extras" were dealt with by Dickson's representatives discussing the proposed changes and expected costs with Misenar and Misenar approving or rejecting the work, in lieu of written change orders.

The trial court found Dickson provided Misenar a written estimate/change order regarding the change from HDPE pipe to DIP pipe.[122] The trial court found that Misenar required a written estimate from Dickson regarding the import trench backfill.[123] There is undisputed testimony (and numerous documentation proving)[124] that Misenar asked Dickson for notice of price changes and change orders.[125]

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[121] See Trial Exhibits Nos. 3, 12, 13, 30, 43, 44 & 45.
[122] CP 141, 143.
[123] Trial Transcript, page 512, lines 5-20.
[124] See Trial Exhibits Nos. 30, 43, 44 & 45.
[125] Trial Transcript, page 421, lines 3-5.

There is evidence that Dickson's representative, Mr. Hoven, believed items included in the contract's scope to be "extra" because he was working off of the 9/12/05 plans, instead of the 10/6/05 "approved plans" as required in the contract.[126] Misenar disputed these items to be "extras" and did not see a need for a written change order.[127]

While there is ample evidence in the record that the parties did not mutually agree to waive the contract's written change order requirement, there is no evidence of the purported agreement that Dickson's representatives would discuss proposed changes and expected costs with Misenar, who would either approve or reject the change.

2. Misenar did not unequivocally waive the requirement for written change orders from Dickson.

As discussed above, waiver by conduct requires unequivocal acts of conduct evidencing an intent to waive.[128] Equivocal conduct cannot, by definition, be unequivocal.[129]

The trial court found that the parties agreed to waive the contractual requirement of written change orders. The trial court did not find that Misenar's conduct was an unequivocal waiver of the change

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[126] Trial Transcript, page 411, lines 6-25 through page 412, lines 1-19; page 423, lines 13-19; page 425, lines 10-25 through page 426, lines 1-17.
[127] Trial Transcript, page 328, lines 2-12; page 671, lines 5-11.
[128] *American Safety Cas. Ins. Co.*, 162 Wash.2d at 773.
[129] *Id.* at 771.

order requirement. Even if the trial court implicitly found that Misenar's conduct was an unequivocal waiver of the written change orders, there is not substantial evidence in the record to support such a finding.

The trial court found (supported by substantial evidence) that Dickson provided written notice and produced a written estimate (change order) for the change in price for the DIP pipe. The trial court found (again, supported by substantial evidence) that Misenar had requested a written estimate from Dickson for the import trench backfill (BEFORE Mr. Hoven had it delivered by another contractor).

The undisputed evidence proves that Dickson's project manager was working off of the wrong set of plans for this project and that Misenar, working off of the correct set of "approved plans", did not recognize the work identified by Mr. Hoven to be "extras."[130] Dickson's own witness, Mr. Hoven, testified that Misenar asked for change orders.[131]

The trial court's unchallenged FF Nos. 8, 9, 11, & 13 show that Misenar neither intended to nor waived its contractual right to require timely notice and written change orders. The undisputed evidence that Dickson used the wrong set of plans on this project and Dickson's concession that Misenar requested change orders together prove that

[130] Trial Transcript, page 411, lines 6-25 through page 412, lines 1-19; page 423, lines 13-19; page 425, lines 10-25 through page 426, lines 1-17.
[131] Trial Transcript, page 421, lines 3-5.

Misenar neither intended to nor waived its contractual right to written change orders.

Mr. Hoven testified in his Declaration in Support of Summary Judgment and at trial that the parties decided to agree on a price and add it to a pay estimate. Hoven's declaration testimony is contradicted by the trial court's undisputed findings and his own trial testimony. Dickson brought an action to recover for twelve (12) "extras" and the trial court awarded it five (5) of its claims. Only two (2) of those claims, the change in pipe and the change in backfill, were ever added to a pay estimate.[132] The trial court found that Dickson provided a change order for the change in pipe and that Misenar requested a change order for the import trench backfill.

The trial court found that Mr. Misenar immediately objected to the pay estimate containing the "extras" and the record shows that Dickson gave Misenar a credit (which Misenar interpreted to be for the overbilling for the import trench backfill) immediately following Mr. Misenar's objection.[133]

Even if the trial court accepted Hoven's testimony that the parties decided to agree on a price and add it to the following pay estimate, such an agreement would be inconsistent with Misenar's multiple requests for

[132] Trial Exhibit 37.
[133] Trial Exhibit 64.

change orders, Dickson providing Misenar a change order for the pipe change and Misenar's objection to the charges when Dickson did not provide a change order/estimate for the import trench backfill.

There is no evidence that Misenar's conduct throughout this case constituted an unequivocal waiver of the contractual requirement for notice of a change in price and written estimates/change orders before the work was done. The undisputed evidence and the unchallenged findings of fact contradict the trial court's FF no. 5 and CL Nos. 4 & 19.

3. Import trench backfill does not require more labor and equipment than native backfill and Misenar can be held responsible for only the imported material.

The record shows that the only difference between native trench backfill and imported trench backfill is the price of the material itself.[134] The record shows that Dickson would be performing the same work in the construction project whether using native backfill or imported backfill.[135]

Dickson did not physically import the material. Dickson hired a subcontractor/supplier to import the material to the construction site.[136] There is no evidence in the record that import trench backfill required Dickson to perform more labor and or use more equipment than it would have had Pierce County approved of the use of the native backfill.

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[134] Trial Transcript, page 206, lines 17-20
[135] *Id.*
[136] Trial Transcript, page 285, lines 4-6

The parties left the sewer trench backfill out of the contract because they did not know what type of backfill would be required. Dickson used the import backfill exactly as it would have used the native backfill. Aside from acquiring the material itself, Dickson's project costs did not increase by using the imported material. There is absolutely no evidence in the court record to support the trial court's FF No. 14 that the use of the import trench backfill required more labor and equipment than if the native backfill had been used.[137]

The evidence shows that the imported trench backfill cost $14,888.25.[138] The trial court erred in its CL no. 7 when it held Misenar needed to pay more than the cost of only the imported backfill material.

4. The removal of the tree (on Lot 14) was not an "extra" as it was on Misenar's property and not on private property belonging to a third party.

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[137] With regards to the import trench backfill change, in **FF #14**, the trial judge again erroneously shifted the burden to the appellant, Misenar Construction, Inc. by finding that appellant should pay nearly $6,700 of extra funds for labor and equipment costs for handling the "screened pit run" (over what could have been provided and placed by the contractor Holroyd (see ***Trial Ex. #106***) by erroneously reading the provisions of **¶2.20 Furnished Material** of the parties' contract (Trial Ex. #1). The trial judge erroneously assumed that because Dickson unilaterally decided to furnish the material (which in this case happened only because they did not give Mr. Misenar the opportunity to do so before the material was provided), that somehow Misenar should then have to pay for the handling of this material both for the labor and equipment used on site, when if Mr. Misenar had been given the contractual opportunity to have the other contractor, Holroyd, deliver and place the material for the set cost of under $15,000 (see ***Trial Exh. #106***), that the Respondent, Wm. Dickson Co. would have been required, contractually, to handle the material on site and would, therefore, not be entitled to receive additional moneys for labor and equipment. This is just another example of the court erroneously shifting the contractual burden from Wm. Dickson Co., the Respondent to Misenar Construction, the Appellant.

[138] Trial Exhibit No. 106.

The record does not contain substantial evidence to support the trial court's FF No. 16. The evidence shows that Dickson's employees did not properly familiarize themselves with the construction site and mistakenly believed that Misenar did not own the property from which Dickson had to remove the tree. The record does not contain substantial evidence to support the trial court's finding that the tree was located on property that did not belong to Misenar and the trial court erred in presuming and finding that Misenar did not own Lot #14, where the tree was located. Dickson concedes that Misenar owned the property upon which Dickson cleared the tree. Dickson provided the trial court with the recorded, public record evidencing Misenar's ownership of the property. A rational trier of fact cannot disregard official property records and Dickson's concession. There is not substantial evidence to support the trial court's finding that Misenar did not own the property upon which Dickson removed the tree.

It is undisputed that Misenar owned the property upon which Dickson removed the tree. It is undisputed that Dickson bore the responsibility to clear and grub the construction site, including removing all structures and trees (including the tree in question) in order to complete its work in site development. A rational fact finder cannot ignore the

parties' contract and the undisputed interpretation that the contract charged Dickson with responsibility for clearing and grubbing Misenar's property. There is not substantial evidence to support the trial court's finding that "[b]ecause the tree was not on property that was to be cleared and grubbed, it could not have been contemplated that the tree would have to be removed under the contract."

Dickson presented three witnesses that performed the work on behalf of Dickson: Randy Asahara, Michael Hoven, and Shawn Hammond. Each of Dickson's witnesses admitted that, according to the 10/6/05 "approved plans", that the tree needed to be removed.[139] Misenar consistently took the position that the tree removal was part of the plans.[140] A rational trier of fact cannot ignore the testimony and exhibits showing virtual agreement that the tree needed to be removed pursuant to the 10/6/05 plans. There is not substantial support for the trial court's finding that "[t]he plans never called for the specific removal of [the] tree."

Given the lack of evidence and/or written change orders[141] that the tree was an "extra", the trial court erred in its CL No. 9 in holding that

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[139] Misenar's expert agreed with Dickson that, according to the 10/6/05 plans, the tree needed to be removed. Trial Transcript page 670, lines 15-25 through page 671, lines 1-11.
[140] See Trial Exhibit #28A.
[141] Trial Transcript No. 958, lines 4-17.

Misenar must pay the cost of the additional tree in the amount of $2,680.00.

5. The contract charges Dickson with being responsible for any cost of repairs to its work.

A basic rule in the construction of contracts is that the intention of the parties must control.[142] The intent of the parties must be ascertained by reading the contract as a whole.[143]

Ambiguity will not be read into a contract where it can reasonably be avoided by reading the contract as a whole, even though some words may be said to be ambiguous.[144] If terms of a contract taken as a whole are plain and unambiguous, the meaning should be deduced from the language alone without resorting to parol evidence.[145] Words in a contract should be given their ordinary meaning.[146] Courts should not make another contract or different contract for parties under the guise of construction.[147]

In the parties' contract, Dickson "specifically agreed that it was responsible for the protection of its work until final completion and

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[142] *See e.g. Truck Ins. Exchange v. Rohde*, 49 Wash.2d 465, 469, 303 P.2d 659 (1956) (citing *Silen v. Silen*, 44 Wash.2d 884, 890, 271 P.2d 674 (1954)).
[143] *Truck Ins. Exchange*, 49 Wash.2d at 469 (citing *Johnson v. Maryland Casualty Co.*, 22 Wash.2d 305, 308, 155 P.2d 806 (1945)).
[144] *See e.g. Universal/Land Const. Co. v. City of Spokane*, 49 Wash.App. 634, 636, 745 P.2d 53 (1987).
[145] *Id.*
[146] *Id.*
[147] *Id.*

acceptance" from Misenar.[148]

When the trial court held that Misenar must pay the cost for the repairs to the asphalt necessitated by the work of a third party, in CL No. 16, it erroneously shifted Dickson's contractual financial responsibility to Misenar. The contract's language is clear and unambiguous. Dickson had a contractual responsibility to protect and bear the costs incurred to repair its work.[149]

6. Misenar proved that Dickson saved a significant amount when it convinced Misenar to change the lot and road grades, thus eliminating Dickson's contractual obligation to import nearly 15,000 tons to *"cut and fill to subgrade"* (i.e., balance the site), for which Dickson gave Misenar no credit.

Misenar provided substantial evidence establishing that when Dickson proposed grading changes that resulted in 117 (232 tons) of surplus material, Dickson's project costs decreased significantly. The trial court erred when it ignored Dickson's savings in FF No. 25 and CL No. 18, compounding its error in FF No. 14.[150] There is not substantial

[148] Trial Exhibit No. 1, Sect. 2.16

[149] While there is no evidence to support FF No. 23 being an "extra" to the contract, if believed that the repairs were not within the scope of the parties' contract as stated in section 2.16, it had a contractual duty to disclose the work was outside the scope of the contract and provide a written change order accordingly.

[150] In FF No. 14, the trial court erroneously condoned Dickson's charging of unwarranted and exorbitant "labor and equipment" prices for handling the "native soil" from the sewer trench, when there was NO evidence at trial that Dickson had to incur any additional such expenses. There was actually evidence from Dickson's own witnesses to the contrary that NO additional costs would be incurred for handling "native soil" vs. imported material. Trial Transcript, page 206, lines 17-20.

evidence for the trial court's FF No. 25. The trial court erred in its CL Nos. 18 & 24.

7. Misenar did establish that an "accord and satisfaction" had occurred upon Misenar's tender of, and Dickson's negotiation and acceptance of, the check for final payment within 30 days of final acceptance of work.

Where the amount is disputed, accord and satisfaction may be implied from surrounding circumstances.[151] An accord and satisfaction is implied from the circumstances if, in fact, the amount due is disputed, the debtor tenders his check in full payment of the debt, and the creditor cashes the check.[152]

The required intent for accord and satisfaction is shown when payment is offered in full satisfaction and is accompanied by conduct from which the creditor cannot fail to understand that payment is tendered on the condition that its acceptance constitutes a satisfaction.[153]

When a debtor sends to his creditor a check in an amount that the debtor is willing to pay, and at the same time informs the creditor that the debtor intends the check to be considered full payment, then, by accepting

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[151] *See e.g., U.S. Bank Nat'l Ass'n v. Whitney*, 119 Wash.App. 339, 350, 81 P.3d 135 (2003) *See also Evans v. Columbia Intern. Corp.*, 3 Wash.App. 955, 957 478 P.2d 785 (1970).
[152] *Id.*
[153] *U.S. Bank Nat'l Ass'n*, 199 Wash.App. at 351; *See also Ingram v. Sauset*, 121 Wash. 444, 446-7, 209 P. 699 (1922).

and cashing the check the creditor agrees to the settlement and cannot thereafter seek additional compensation.[154]

Endorsement and deposit of check constitutes acceptance and funds are accepted when the creditor removes funds from debtor's control.[155]

There is no dispute that the parties do not (and did not) agree on the amount owed on the contract and that, as of the spring of 2007, that Dickson was claiming to be owed more than $62-65,000.00+ more than what Misenar believed that he owed[156]. There is also no dispute that on May 24, 2007, Misenar tendered a check in the amount that Misenar was willing to pay and noted it as the "*Final Billing w/ ret.* (retainage)" on the paperwork the Misenar provided to Dickson with the final payment. It is undisputed that Dickson cashed the check and took control of the monies tendered. For the next year, both parties behaved and communicated as though Misenar had paid the contract in full.

It is well established that when a debtor tenders a check intending it to be the final payment and clearly indicates the same, the parties enter into an accord and satisfaction. The well established case law prohibits

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[154] *Kibler*, 73 Wash.2d at 526 (citing *Graham v. New York Life Ins. Co.*, 182 Wash. 612, 47 P.2d 1029 (1935)).
[155] *See e.g., State, Dept' of Fisheries v. J-Z Sales Corp.*, 25 Wash.App. 671, 680, 610 P.2d 390 (1980).
[156] See Trial Exhibit #64, at pages 8-10.

the creditor from accepting the debtor's final payment and then seeking additional compensation.

Misenar sent, and Dickson received, Misenar's May 24, 2007 final payment within thirty (30) days and according to the terms set forth in the parties' contract, section 2.5. Dickson's decision to negotiate that final check from Misenar constituted an accord and satisfaction.

There is not substantial evidence for the trial court's FF No. 27. The trial court erred when it dismissed Misenar's affirmative defense of accord and satisfaction. The trial court erred in its CL No. 18.

8. Misenar's un-contradicted evidence established its right to the recovery of costs incurred as a result of Dickson's actions and failures to perform, under the contract.

As discussed above, it is undisputed that Dickson agreed to clear and grub the project. Misenar presented un-contradicted evidence that Misenar incurred costs in clearing and grubbing and re-staking the entry curbs.[157] Misenar's evidence documented Misenar's tender of the final payment on the contract (including retainage), Misenar's calculations, and the costs Misenar incurred when Dickson failed to clear and grub the

[157] Trial Exhibits Nos. 61 & 62. These exhibits came from Dickson's own files. Trial Transcript, page 983, lines 19-25 through page 984, lines 1-11. This is in reference to Misenar's third counterclaim found on CP 504.

project according to the contract and when Dickson removed, buried, and/or misplaced survey stakes[158].

There is not substantial evidence to support the trial court's FF No. 29.[159] The trial court erred in its CL No. 21.

9. Dickson was contractually obligated to reconcile the structural and civil plans in order to construct the pond wall in the proper location.

While Misenar does not dispute that the two plans "were not reconciled", the substantial evidence does not support the trial court's implication (and later findings) that Misenar (not Dickson) was contractually responsible for reconciling the plans.[160] According to the contract[161], it was Dickson's responsibility to construct the pond and put the pond wall and the bypass line in the proper locations. The trial court erred in its CL No. 22.

10. Dickson failed to request staking of the location of the pond wall, which was Dickson's responsibility, in order to properly locate the pond wall.

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[158] *Id.*

[159] The trial court erred in not considering the totality of this un-contradicted/unchallenged evidence, particularly in light of Dickson's failure to reply to this Counterclaim until AFTER Misenar filed its *Motion for Directed Verdict*. (CP 648-654 & CP 659-662)

[160] This is another example of the trial court implying some type of wrongful conduct or lack of action by the Owner (or the owner's Engineer) and thus improperly shifting the contractual burden for responsibility for proper performance of the work under the Contract from the Contractor to the Owner (or the owner's representative, Engineer).

[161] ***Trial Exhibit #1*** *at page 2, ¶2.2 & ¶2.3.*

The trial court's FF No. 32 is NOT supported by the record.[162] The trial court seems to imply that Misenar had some responsibility with regards to staking for the bypass line and for the pond wall. The trial court improperly shifted the contractual burden for responsibility for proper performance of the work under the Contract from the Contractor (Dickson) to the Owner (Misenar).

Even assuming that some evidence could support the finding that the southern portion of the Pond Wall was staked[163], the Contractor, Dickson improperly installed the western wall (the one running north-south which was supposed to be parallel to the boundary line between

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[162] (i.e., that "*At least the southern portion of the wall was staked by Sadler Barnard.*")

[163] Appellant does not concede that the evidence at trial supported this part of FF #32, as the trial court apparently confused references to a "rockery wall" that was staked by Sadler Barnard with the "Pond (UltraBlock) Wall". (**TT. P. 740, ll. 6-24**). A close look at ***Trial Exhibit #143 & #116*** shows that the "4' ROCKERY" that was located on the perimeter of the "15' Gravel Access Road" (that runs from the outflow of the Pond out to 23rd Avenue) was the "rockery wall on the perimeter of road" that Mr. Isaacson testified as follows: "we staked the rockery wall." (**TT p. 740, ll. 22-23**) (see also **TT p. 771, ll. 14-23**). Mr. Isaacson testified, and the un-contradicted documentary evidence established that Dickson (through Mr. Hoven or any other Dickson representative) did NOT request staking of the western wall of the Pond OR re-staking of the bypass line, after the new pond wall plans (***Trial Exhibit #2***) were provided to Dickson (on 10-21-05) (see ***Trial Exhibit #81*** (page 1)), and the revised Site Plans (***Trial Exhibit #116***) were provided to Dickson as well (**TT. p. 876, l. 14 thru p. 877. l. 10**).

The extent of the documentary evidence and the testimony from Eric Isaacson, the representative of Sadler Barnard, regarding his company's staking of the Pond or features of the Pond (and, for that matter, the bypass line) are set forth in ***Trial Exhibits 143 & #146*** and at **TT p. 734, ll. 16-25; p. 735, ll. 9-12; p. 738, l. 21 to p. 739, l. 4 & l. 21 to p. 740, l. 1 & ll. 6-24; p. 741, ll. 14-17; p. 742, l. 4 to p. 747, l. 15; p. 748, ll. 3-7; p. 752, ll. 21 to p. 753, l. 1; p. 754, l. 9 to p. 755, l. 22; p. 755, l. 23 to p. 757, l. 11** (no request for staking pond wall); **p. 758, l. 2 to p. 761, l. 15** (surveyors received new plans and pond wall design and bypass line location (***Trial Exhibit #116***, 10-20-05 Plans), but no request from Contractor to stake proper location for pond wall); and **p. 783, l. 19- p. 784, l. 1** (no request to locate pond wall).

Tract C and Lot #2), putting it partially on Lot #2, within the 12' easement area. There was neither a finding, nor any evidence to support a finding, that Dickson called for the surveyor to stake the location of western wall of the Pond, but to the contrary[164]. The only actual evidence (i.e., testimonial and documentary evidence) that there was staking done in the vicinity of both the Pond and the bypass line was through Eric Isaacson who confirmed that Dickson (through Mr. Hoven) only asked them, on 10-20-05, to stake the Catch Basins (#1, #2, #3, 'Outfall' and "Bypass")[165] (and then based on the 10-6-05 plans and NOT for the revised plans of 10-20-05). Mr. Isaacson testified that later (on 10-26-05) the surveyors were asked to stake the "Rockery" (the rock wall at the northern section of the pond).[166].

Virtually all of Dickson's employees testified that Dickson could not build something without proper staking. Within the first 2-3 weeks of this 6-month project, Dickson failed to secure survey staking for the western Pond Wall and ultimately installed it in the wrong location. There is no evidence of any discussion or plans, in any email, in testimony, in any other document or site plan, of any plan to move the western wall of

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[164] *Id. See also* Footnotes 165 & 166, infra and see **TT p 741 ll. 14-17.**

[165] ***Trial Exhibit #143 & #144.*** See also **TT. p. 742 ll. 16-20, p. 743 ll. 7-10, p. 745 ll. 5-15, p. 747 ll. 3-6**, See also **TT p. 751 ll. 21-23.**

[166] ***Trial Exhibit #117.*** See also **TT p. 740 ll. 6-13 & ll. 20-23; TT. p. 971 ll. 14-23.**; see also ***Trial Exhibit #143.*** **NOTE:** the evidence of later 'staking requests' was for the sewer structures (see ***Trial Exhibit #146***).

the Pond to any other location than to be built within the boundaries of Tract C.

There is not substantial evidence to support the trial court's FF No. 32. The trial court erred in its CL No. 22.

11. Dickson failed to secure proper staking, and approval from the City of Milton, for the relocation of the bypass line to its current location (outside of the 12' easement area).

The court erred in finding that Mr. Hammond was the person who "discovered" a conflict with the bypass line and the wall. The evidence shows that Misenar's president, Mr. Misenar communicated with Mr. Hoven on October 20, 2005 about the need to move the line (and, hence, the manholes, i.e., catch basins). Mr. Hoven "*suggested moving the bypass line to the center of the driveway (easement)*"[167] Misenar received the new Pond Wall designs and plans (***Trial Exhibit #2***) on October 21, 2005 and forwarded them to Mr. Asahara at Dickson that same day.[168]

The bypass line had" *to be relocated a minimum of 8 feet to west to avoid wall bearing conflict."*[169] Sheet C-3 of the approved plans[170] clearly showed that the section of the Retention Pond Wall, running north

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[167] See ***Trial Exhibit #81,*** at page 2, first paragraph of the Thursday October 20, 2005email from Bodi Misenar to Hal Hagenson

[168] See ***Trial Exhibit #81***, page 1.

[169] (See **Note 2)** on page 1 of ***Trial Exhibit #2***)'

[170] (both the Plans with revision date of 10-6-05 (***Trial Exhibit #115***) and those Plans with revision date of 10-20-05 (***Trial Exhibit #116***)

and south (parallel to the boundary line between Tract C and Lot #2 of the Plat) was supposed to be located COMPLETELY within Tract C (a fact which was confirmed by Mr. Asahara (**TT p. 35 l. 4 to p. 36 l. 13**), by Mr. Hammond (**TT p. 146 ll. 22-25**) as well as by Mr. Eric Isaacson, the surveyor (**TT p. 788 l. 16 to p. 789 l. 1 & p. 790 ll. 10-18**) and by the civil engineer who prepared the site plans, Hal Hagenson (**TT p.902, ll. 11-16 and p. 907 l. 25 to p. 908. l. 4**.)). Hence, the bypass line SHOULD have been installed about 8' to the west of the boundary line between Tract C and Lot #2 IF Dickson had properly installed the pond wall.

Dickson did not build that section of the Pond Wall within Tract C. Instead, Dickson installed the Wall so that it encroached 4'+ westerly into and encroaching on Lot #2. Dickson was responsible to "Build Pond"[171] (which included the Pond Wall and was to be located fully within Tract C) according to the Site Plans (***Trial Exhibit #115*** as revised in ***#116***) (the civil plans for location) and the "*Lakeridge Estate Retaining Walls Design*" (***Trial Exhibit #2***) (the structural plans for design and construction).

Dickson's employee, Shawn Hammond was aware *"that the bypass line was supposed to go in the middle of the easement."* (**TT p.**

[171] See Contract, ***Trial Exhibit #1*** at **¶2.3 Site Work**: "Clearing, ..., **Build pond**, ..." (**Emphasis** added)

157, ll. 5-7.)[172] Hammond testified that he discovered that "*the stakes were wrong on the (bypass line) pipe.*" (**TT p. 185 ll. 3-4**).

However, Hammond testified that Dickson had put in "*[the] block wall (the UltraBlock Pond Wall) in according to all the stakes that were there ...*" (**TT p. 184 ll. 22-24**). Mr. Hammond, Dickson's lead foreman in the field, in charge of making sure that the crews do their work according to the Plans ultimately confirmed (on both cross-examination and re-direct examination) that they put in the bypass line BEFORE putting in the Pond Wall (**TT p. 172 ll. 3-7 (cross) & p. 172 l. 22 to p. 173 l. 8 (re-direct)**).

The trial court erred in reading and reciting (and apparently relying only upon) the short phrase from Engineer, Hal Hagenson's Oct. 24, 2005 email re: Shawn Hammond's request to move the bypass line (*"it looks like a doable relocation"*) out of context. The record does not show if Hammond (at the time of his call to the civil engineer, Hal Hagenson) possessed the final approved plans with revision date of October 20, 2005 (see Sheet C-3 of ***Trial Exhibit #116***), but is certainly was his responsibility to use the correct set of site plans. The final approved plans

[172] A fact to which Mr. Eric Isaacson also testified (**TT p. 790 l. 19 to p. 791 l. 3**) and to which Hal Hagenson confirmed (**TT p. 902., ll. 4-10**).

show the bypass line to be "in the middle of the 12' easement" (as was suggested by Michael Hoven[173]).

A complete reading of this email reveals that Misenar's Engineer (Hagenson) directed Dickson's project manager (Hoven) that Dickson *"should gain the city's blessing to make the move"*.[174]

Trial Exhibit #131

From: "Hal Hagenson" <H.Hagenson@comcast.net>
To: <michael.wmdickson@comcast.net>
Cc: "Bodi Misenar" <bodimisenar@comcast.net>
Sent: Monday, October 24, 2005 10:44 AM
Subject: Lakeridge Estates-bypass line

Mike:
I got a call friday from Shawn Hammond with your company, saying he wanted to shift the storm bypass line another 8' west of the latest design location (ie 14' west of the original design location) in order to minimize any impacts to the adjacent retaining wall between the detention pond and the bypass line. I'm a bit concerned that the relocatin would encroach on the potential building space on the lot further than already exists, and we certainly you should gain the city's blessing to make the move. There would be only slight adjustments to the inverts, so practically, it looks like a doable relocation. Let me know if you need my further input,

Hal Hagenson, P.E.

Dickson failed to secure any updated staking by Sadler Barnard to be sure that it could install both the bypass line and the western wall of the

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[173] See ***Trial Exhibit #81***, page 2.

[174] See Hal Hagenson's testimony explaining his intent re: the 10/24/05 email (***Trial Exh. #131***) at **TT p. 904, l. 2 to p. 907, l. 9**), the lack of ANY follow up from Michael Hoven at **TT p. 907, ll. 10-24** and Mr. Hagenson's concerns re: locating the bypass line in any place other than the center of the easement (**TT p. 910, l. 21 to p. 911, l. 8**)) The statement that "*it looks like a doable relocation*" referred to the fact that "*[t]here would be only slight adjustments to the inverts*" and did NOT, in any way, relieve Mr. Hoven (and hence Dickson) from getting actual approval from the City BEFORE moving the bypass line.

pond in the proper place. Dickson is contractually responsible for its failure to properly install the bypass line and western wall of the pond in the proper locations, pursuant to the approved Site Plans.

There is not substantial evidence to support the trial court's FF No. 33. The trial court erred in its CL No. 22.

12. Dickson was in fact responsible for the improper construction of the ultrablock (pond) wall and the miss-located bypass line.

The trial court erred in its FF No. 34 that Dickson was "not responsible" for the improperly installed pond wall and the improperly located bypass line. Dickson provided ample evidence that it that Dickson "does not do surveying (or staking)." **(TT p. 21 ll. 5-8)** Dickson's employees testified that if Dickson moved the stakes or were doing a "layout", that it *"would assume liability"* if it were to "*change the stakes"* and *"whatever [it is] building is incorrectly installed."* **(TT p. 2 ll. 5-14)**. Mr. Asahara ALSO made it clear that it was Dickson's responsibility to request staking by the surveyors, particularly of "pipe" and of the "ultrablock wall". **(TT p. 21 ll. 12-21)**

Dickson's evidence confirmed that the Engineer (Hal Hagenson, who drew up and revised the Site Plans – ***Trial Exhibits #115 & #116***) determined where the walls were supposed to be located but that Dickson was responsible to put in the wall "in the field". **(TT p. 91 ll. 9-19)**

Though Mr. Hammond denied doing any "surveying" or putting in any "stakes", he confirmed that he helped Mr. Hoven to "layout" where (they thought) the bypass line was supposed to be installed. (**TT p. 157 ll. 12-18**).

Though the trial court rightfully found that there was discussion that the bypass line had to be moved (from it's location on the original 10-6-05 Plans (***Trial Exhibit #115***)) – there is NO evidence in the record that the parties discussed the moving of the western wall of the pond (i.e., the wall perpendicular to Nevada Ct. (the street in the Plat)) from being FULLY within Tract C to encroaching into Lot #2 and the 12' easement.

Dickson's own expert surveyor, Mr. Henry Coates, confirmed that Sheet C-3 of the Site Plans[175] showed the southerly wall for the pond[176] was supposed to "start" (on the easterly end) "*somewhere within boundary of Lot 1*" and that "*the west block wall of (the) pond, was supposed to be located within the boundary line of Tract C.*"[177] Mr. Coates confirmed that according to the E3RA plans[178] that the "L-shaped" wall that they designed was designed to fit within Tract C and NOT have the westerly wall cross over the property line between Tract C and Lot #2.[179]

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[175] ***Trial Exhibit #116***
[176] The portion of the wall parallel to Nevada Ct..
[177] **TT p. 1049 ll. 7-21**.
[178] ***Trial Exhibit #2***
[179] **TT p. 1051 l. 23 to p. 1052 l. 4**.

The contractual requirements and the substantial evidence at trial supported Misenar's position and Counterclaims Nos. 4 & 5, as Dickson WAS in fact responsible for the proper placement of both the pond wall and the bypass line.

There is not substantial evidence for the trial court's FF No. 34. The trial court erred in its CL No. 22.

13. The trial court applied the wrong standard for establishing damages arising out of Dickson's improper work, Misenar proved its damages (by way of uncontroverted evidence) and Misenar did not waive its claims against Dickson.

The trial court erred in its FF No. 35 in finding that "*Misenar failed to prove any damages from the location for the wall and the bypass line.*" Misenar provided ample uncontroverted evidence of its damages.

(1) Dickson installed a section of the Pond Wall "within" the boundaries of an *Ingress and Egress Easement* which Misenar was required to provide to the lot owners to the north (Aldridge) and over which and on which Misenar COULD NOT erect any "structures". The Easement contained the following restriction:

> The Grantor, their heirs, successors and assigns, shall have free use of the land occupied by said Easement except that no building or other structures shall be constructed over said Easement.

(CP 896).

(2) Dickson installed the bypass line outside of the designated 12' easement area, significantly infringing upon the "building envelope" for Lot #2. On October 24, 2005, Misenar's Engineer, Hal Hagenson warned Dickson's project manager Mr. Hoven to check with the City of Milton about BEFORE *"making the move"* (and installing the bypass line 14' from the original plan location). (See ***Trial Exhibit #131***).

Notwithstanding this directive to *"gain the city's blessing,"* Dickson installed the Catch Basins (Manholes) Nos. 2 & 3, located on the south and north ends of the section of the bypass line in question[180] on Monday October 24, 2005 (see ***Trial Exhibit #122***, pages 5-6) in their present location "outside" of the 12' drainage easement area, WITHOUT ANY effort having been made by Messrs. Hammond or Hoven to verify if it was acceptable to the City. Dickson did not secure any updated staking from the surveyor. Dickson located the bypass line in the wrong location, which necessitated Misenar's bringing of Counterclaim No. 4 (**CP 505-6**).

(3) In order to remedy Dickson's glaring defects, Misenar produced un-contradicted evidence that the cost to relocate the Pond Wall and to relocate the bypass line into the proper locations was going to cost, at least $36,336.20 and $28,250.00 (plus sales taxes, permits, survey costs), respectively. (See ***Trial Exhibits # 149 & #95***). Misenar sought

[180] See Sheet C-3 of ***Trial Exhibit #116*** and designations of "**CB#2** & **CB#3** (both 'TYPE II-48 SOLID LOCKING LID')

these monetary amounts to fix the deficiencies created by Dickson. The trial court erred in denying the damages award to Misenar, particularly in light of the fact that the trial court required Misenar to pay the full price for the changed Pond Wall costs ($51,520.00 + sales tax) and for the improperly installed Bypass line (total bid price $22,845.90) and two catch basins (total unit Bid cost for two $5,340.00) (both plus WSST) (See ***Trial Exhibit #3***, Bid Item lines 100 & 160). Dickson neither challenged the estimates nor offered ANY evidence of the "loss of value of property" (see discussion re: FF #36, below).

The trial court's erroneously quoted and/or relied upon an April 19, 2006 email from Mr. Misenar to Mr. Hoven, occurring AFTER the project was FINALLY finished by Dickson (other than the final lift of asphalt paving) (a project scheduled by Michael Hoven to start 10/18/05 and last 2 months[181], was not finished until March 2006). Mr. Misenar's statement to Mr. Hoven did not waive Dickson's ultimate responsibility to install the bypass line in the proper location. Mr. Misenar expressed what Misenar HAD to do at that time[182].

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[181] (see ***Trial Exhibit #80***)

[182] See the following trial exhibits in which Mr. Misenar first learned of the improperly installed bypass line and his communication with Mr. Hoven regarding same: ***Trial Exhibit #92*** - Emails of 4/13/06 – 4/14/06 between Surveyors (Mike Luna of Sadler Barnard) Bodi Misenar (Misenar Const.) & Michael Hoven (Dickson) **and** ***Trial Exhibit #74*** - Emails of 4/19/06 between Bodi Misenar (Misenar Const.) & Michael Hoven (Dickson)

Misenar had to get "final Plat approval" to begin constructing (and then selling) houses on the Lots of the Plat.[183] As Mr. Misenar testified[184], Misenar was paying "just over $10,000 a month" as "interest payments" on its A&D Loan[185] for the project. Dickson told Misenar that this project should take approximately two (2) months when it took over six (6) months.[186] Misenar paid at least $20-$40,000.00 in extra interest charges as a result of Dickson's delays and the trial court should have awarded it those damages (and/or offset them against any award to Dickson).

In April 2006, Misenar could NOT afford (at $10,000.00/month interest payments, no extension from the bank and possibly a few more months delay in getting final plat approval) to fix the miss-located bypass line. Therefore, within 5 days of learning of the mistake by Dickson,[187] it did what it could do to work through the issue (with the City of Milton) to get "final plat approval" (and start building houses).[188]

The fact that Misenar chose to "accept the work" of Dickson (in April 2006), notwithstanding the miss-located bypass line, did NOT

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[183] (**TT p. 999, ll. 13-23**).
[184] **TT p. 953, ll. 11-17**.
[185] Acquisition and Development Loan (**TT p. 868, l. 9**).
[186] CITE
[187] See ***Trial Exhibit #92***
[188] **TT p. 1000, ll. 2-8**.

relieve Dickson of responsibility for such mistake nor did it constitute a waiver of Misenar's claim arising from Dickson's improper work.[189]

There is not substantial evidence to support the trial court's FF No. 35. The trial court erred in its CL Nos. 22 & 23.

14. The trial court applied an improper standard and erred in shifting the burden of proof for establishing damages arising out of Dickson's improper work, Misenar proved its damages with uncontroverted evidence.

The trial court erred in its FF No. 36 when it imposed an improper "standard" of calculating and proving damages.[190] The proper standard in determining Misenar's damages is the cost to remedy Dickson's defective work to meet Misenar's expectations and Dickson's responsibility under the contract. The contract charged Dickson with building the Pond Wall within the proper boundary of Tract C and install the the bypass line within the 12' easement area and NOT encroaching on the building envelope of Lot #2.[191]

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[189] See ***Trial Exhibit #1*** at page 3 ¶2.5(b) "... Final acceptance of the Work by the Owner is not a waiver of any claims the Owner may have against the Contractor."

[190] The standard the trial court applied may have applied in an encroachment context with neighbors (i.e., the value of the lost property) – but such standard does not and should not have been applied for this commercial development breach of contract context.

[191] Panorama Village Homeowners Ass'n v. Golden Rule Roofing, Inc., 102 Wash.App. 422,427-8, 10 P.3d 417 (Div 1, 2000) (**Contract damages are ordinarily based on the injured party's expectation interest and are intended to give the injured party the benefit of its bargain**. *Eastlake Constr. Co., Inc. v. Hess*, 102 Wash.2d 30, 46, 686 P.2d 465 (1984) (quoting Restatement (Second) of Contracts § 347 cmt. *a* (1981)). In cases involving breach of a construction contract, the injured party may recover the reasonable cost of completing performance or remedying defects in the construction if the cost is not

The trial court erred in imposing a burden of proof of the "loss of value of property" (vs. the costs to remedy the obviously defective work done by Dickson) on Misenar. Such burden was on Dickson, which presented NO evidence of the alleged "loss of value of property"[192]. The trial court erred in failing to accept Misenar's evidence of the costs to remedy the defective work, when Dickson failed to present any evidence to the contrary.

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clearly disproportionate to the probable loss in value to the party. *Eastlake*, 102 Wash.2d at 47, 686 P.2d 465 (adopting Restatement (Second) of Contracts § 348 (1981)). The comments to the rule indicate that this alternative basis for damages applies when it is difficult to determine the value of performance to the injured party with sufficient certainty.

Sometimes, especially if the performance is defective as distinguished from incomplete, it may not be possible to prove the loss in value to the injured party with reasonable certainty. In that case he can usually recover damages based on the cost to remedy the defects. **Even if this gives him a recovery somewhat in excess of the loss in value to him, it is better that he receive a small windfall than that he be undercompensated by being limited to the resulting diminution in the market price of his property.** *Eastlake*, 102 Wash.2d at 47-48, 686 P.2d 465 (quoting Restatement (Second) of Contracts § 348 cmt. *c* (1981)); *see also* Restatement (Second) of Contracts § 347 cmt. *b* (1981)). (**Emphasis** added).

[192] Panorama Village Homeowners Ass'n v. Golden Rule Roofing, Inc., 102 Wash.App. 422,428-9, 10 P.3d 417 (Div 1, 2000) ("The Restatement proportionality rule adopted in *Eastlake* does not require the trial court to measure the loss in value caused by the breach, but only to determine whether the cost to remedy the defect is clearly disproportionate to the owner's loss. *See* 3 E. Allan Farnsworth, *Contracts* § 12.13 (1990). **Once the injured party has established the cost to remedy the defects, the contractor bears the burden of challenging this evidence in order to reduce the award, including providing the trial court with evidence to support an alternative award**. *See Fetzer v. Vishneski*, 399 Pa.Super. 218, 224-26, 582 A.2d 23 (1990); *General Ins. Co. of Am. v. City of Colorado Springs*, 638 P.2d 752, 759 (Colo.1981); *cf. Andrulis v. Levin Constr. Corp.*, 331 Md. 354, 375-76, 628 A.2d 197 (1993) (using the economic waste standard); 5 Arthur Linton Corbin, *Contracts* § 1089 (1964) **("[A]ll substantial doubt as to the usefulness and value of the defective structure should be resolved against the building contractor."). Here, Golden Rule provided no evidence of the buildings' diminution in value or the cost to repair the defects and did not challenge the reasonableness of Panorama's estimate for the work.)** (**Emphasis** added.)

There is not substantial evidence to support the trial court's FF No. 36. The trial court erred in its CL No. 22.

15. The trial court erred in awarding Dickson a "net judgment" and should have found for Misenar on its counterclaims and, thus awarded Misenar a "net judgment".

Misenar's objection to the trial court's FF No. 37 & CL Nos. 25 & 29 are set forth, collectively, in the objections to all prior objections to the trial court's Findings of Fact that require Misenar to pay more money to Dickson, and which objections are incorporated herein by this reference. As such, no addiitonal specific argument, with regards to this FF #37 & CL Nos. 25 & 29, is necessary.

16. The trial court erred in awarding Dickson any pre-judgment interest, and certainly from January 2007 forward.

The trial court erred in its FF No. 38 in making or even referencing any "finding" that "*Dickson issued a pay estimate dated May 1, 2006, ...*" as NO such "Pay Estimate" was admitted in the trial.[193] Dickson had three (3) different proposed Exhibits of purported Pay Estimate #5 (proposed Trial Exhibits #15, #50 (which was offered, objected to and

[193] Only **Pay Estimates 1-4** were admitted at trial – see ***Trial Exhibits #34-37***. NOTE: It was established at trial that pages 2 & 3 of ***Trial Exhibit #49*** that are labeled as "*Pay Estimate 5*" were provided by Mr. Hoven to Mr. Misenar at the June 18, 2008 meeting (and thereafter as an email attachment in Excel spreadsheet format, on that same date (**TT p. 988 l. 24 to p. 989 l. 18**). There was NO testimony or evidence presented that such document, "Pay Estimate 5" was provided to Misenar prior to June 18, 2008.

admissibility DENIED by the trial court) and #70) NONE of which were admitted into evidence.

The record established that the first time Dickson provided Misenar with an "accounting" of the purported "extras", was at a meeting on June 18, 2008 at which time Mr. Hoven provided Mr. Misenar "estimates" for the extras (see collectively ***Trial Exhibit #49*** and ***Trial Exhibits #s 69C, D, E, F, G, H, J, L, M, N & P***) and an Excel spreadsheet document entitled "STATUS.xls" which was shown, at trial, to have been created by Mr. Hoven on June 16, 2008 (see ***Trial Exhibit #51*** (which was "published" on the projection screen to the trial court). If Dickson was owed any more money over and above what Misenar had paid (as of May 2007 – the "final payment and retainage" (see Trial Exhibit #16), then interest should NOT have accrued at all, until trial – but certainly not before June 18, 2008). The trial court erred in its CL Nos. 26 & 29.

VI. CONCLUSION

For the foregoing reasons, this Court should dismiss Plaintiff's Complaint and remand this case to the trial court to enter findings consistent with the court record.

The trial court should also be directed to award the Defendant a "net Judgment" for the Defendants damages (to remedy the defectively

installed western pond wall and bypass line) less the amounts for the DIP pipe price change and the base cost for the import trench backfill.

RESPECTFULLY submitted this **29th** day of **February, 2012**.

SNYDER LAW FIRM LLC

Klaus O. Snyder

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CERTIFICATE OF TRANSMITTAL

On this day, the undersigned sent to the Attorney of Record for Respondent and to Court of Appeals, Division II, a copy of this ***APPELLANTS' OPENING BRIEF*** by [ ] U.S. Mail Postage prepaid [ ] Attorneys Messenger Service & **[XX] Email**

I certify under penalty of perjury the Laws of the State of Washington that the foregoing is true and correct.

Klaus O. Snyder

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